MOTION FILED

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# No. 80-120

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH, *et al.*,
*Petitioners,*

v.

STATE OF SOUTH DAKOTA,
*Respondent.*

# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE LUTHERAN CHURCH-MISSOURI SYNOD AS AMICUS CURIAE IN SUPPORT OF ST. MARTIN EVANGELICAL LUTHERAN CHURCH, *et al.*

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## QUESTIONS PRESENTED

The Lutheran Church-Missouri Synod agrees with the questions presented as set forth in the brief filed on behalf of St. Martin Evangelical Lutheran Church *et al,* and incorporates the same by this reference.

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE LUTHERAN CHURCH-MISSOURI SYNOD AS AMICUS CURIAE IN SUPPORT OF ST. MARTIN EVANGELICAL LUTHERAN CHURCH, *et al.*

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**Motion For Leave To File Brief Of The Lutheran Church-Missouri Synod As *Amicus Curiae* In Support Of St. Martin Evangelical Lutheran Church *et al.***

The Lutheran Church-Missouri Synod respectfully moves the Court, pursuant to Rules 36 and 42 of its Rules, for leave to file the accompanying brief, *amicus curiae,* in support of St. Martin Evangelical Lutheran Church *et al* in the captioned matter.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the fifth largest Protestant body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,800,000 individual members. The congregations of the Synod operate approximately 1,400 elementary and secondary schools situated in most of the states of the United States.

The Lutheran Church-Missouri Synod has been at the forefront of efforts to challege the Secretary of Labor's interpretation of section 3309(b)(1)(A) of FUTA through administrative and judicial means. Its experiences in those efforts result in it being one of a relatively few national church bodies that are uniquely qualified to present to this Court the vital issues that are presented in this case. The issues presented in this case touch upon the core of religious liberty and the fundamental interests of the Synod and its congregations.

Therefore, The Lutheran Church-Missouri Synod strongly supports the position taken by St. Martin Evangelical Lutheran Church *et al* and respectfully requests that the Court accept the accompanying brief.

**Consent To The Filing Of The Attached Brief *Amicus Curiae* Has Been Requested Of The Parties And, Although Granted By St. Martin Evangelical Lutheran Church *et al*, The Said Consent Has Been Refused By Respondent State Of South Dakota.**

The consent of the parties to the filing of the attached brief has been sought by The Lutheran Church-Missouri Synod. Such a consent has been obtained from St. Martin Evangelical Lutheran Church and is appended to this motion. However, respondent State of South Dakota refused such consent. The Lutheran Church-Missouri Synod, accordingly, has proceeded by this motion.

December, 1980

Respectfully submitted,

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# APPENDIX TO MOTION

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December 2, 1980

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Re: St. Martin Evangelical Lutheran Church
and Northwestern Lutheran Academy,
Petitioners,

v. The State of South Dakota

Case No. 80-120

Gentlemen:

The undersigned, as counsel of record for the petitioners in the above matter, hereby consents to your filing of a brief amicus curiae pursuant to Rule 36.2 Rules of the Supreme Court of the United States.

Edward Thomas Schilling

Edward Thomas Schilling
Counsel for Petitioners

# No. 80-120

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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ST. MARTIN EVANGELICAL LUTHERAN CHURCH, *et al.*,
*Petitioners,*

v.

STATE OF SOUTH DAKOTA,
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# BRIEF AMICUS CURIAE OF THE LUTHERAN CHURCH-MISSOURI SYNOD IN SUPPORT OF ST. MARTIN EVANGELICAL LUTHERAN CHURCH, *et al.*

## INTRODUCTION

This brief is respectfully submitted by The Lutheran Church-Missouri Synod. The Lutheran Church-Missouri Synod is a denomination whose member congregations operate more elementary schools in the United States than any other Protestant denomination and, as such, has been in the forefront of the efforts to challenge the Secretary of Labor's interpretation of the provision of the law at issue in this case.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the fifth largest Protestant body in the United States. It has approximately 6,200

member congregations which, in turn, have approximately 2,800,000 individual members. The congregations of the Synod operate approximately 1,400 elementary and secondary schools situated in most of the states of the United States.

The Lutheran Church-Missouri Synod has been at the forefront of efforts to challenge the Secretary of Labor's interpretation of section 3309(b)(1)(A) of FUTA through administrative and judicial means. Its experiences in those efforts result in it being one of a relatively few national church bodies that are uniquely qualified to present to this Court the vital issues that are presented in this case. The issues presented in this case touch upon the core of religious liberty and the fundamental interests of the Synod and its congregations.

## STATEMENT OF THE CASE

The Lutheran Church-Missouri Synod accepts the statement of the case as set forth in the brief filed on behalf of St. Martin Evangelical Lutheran Church *et al,* and incorporates the same herein by this reference.

## SUMMARY OF THE ARGUMENT

The Synod hereby adopts the brief filed for Petitioners St. Martin Evangelical Lutheran Church *et al.,* in its entirety, and incorporates it herein by this reference. However, the Synod will make two supplemental points and one additional point.

The Synod will herein supplement the Petitioners' arguments on the issues presented by making the following points:

1. There is no indication that Congress has ever intended the phrase "church or convention or association of churches" as used in Section 3309(b)(1) to mean something vastly different than what it means under each of the other sections of the Internal Revenue Code in which it is used.

2. The Secretary's interpretation of Section 3309(b)(1) must be rejected because the very notion of applying an exemption dealing with structure ("church or convention or association of churches") on the basis of an activities test ("strictly church duties performed . . . pursuant to . . . religious responsibilities") is repugnant to both religion clauses of the First Amendment, and, if allowed, will have far reaching adverse consequences to religious freedom on many issues beyond the one here immediately involved.

## ARGUMENT

The Synod supplements the Petitioners' Argument as follows:

1. The phrase, "a church or a convention or association of churches," is used in Sections 170(b)(1)(A)(i), 410(d), 414(e)(1)(A), 414(e)(3)(A), 512(b)(14), 514(b)(3)(E), 3309(b)(1) and 7605(c) of the Internal Revenue Code of 1954 (the "Code"). *See* 26 U.S.C., cited sections. The phrase, "churches, their integrated auxiliaries, and conventions or associations of churches" is used in Sections 508(c)(1)(A), 6033(a)(2)(A)(i) and 6043(b)(1) of the Code. *See* 26 U.S.C., cited sections. The Secretary would like to believe that because Section 3309(b)(1) is an exemption from a program which is "social legislation," it ought to be construed more narrowly than is the case when identical or essentially identical words are used in other provisions of the Code.[1] There is no support for such a distinction. There is no indication that Congress has ever intended that, when it used the phrase "church or convention or association of churches" in Section 3309(b)(1), it meant something vastly different than what it meant in using the phrase in the other cited sections of the law.

There is support for understanding the phrase, "church or convention or association of churches," not as buildings, but as organizations, including congregations, parishes, temples and synagogues, and also including those organizations which are often referred to as church "denominations":

a) In an early version of the bill which became the Internal Revenue Code of 1954, Section 170 used the words "a church or a convention or association of churches, *or a religious order.*" (Emphasis added.) In testimony before the Senate Finance

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[1]Decision of the Secretary of Labor holding the States of Alabama and Nevada to not be in conformity with FUTA, at 7 (1979.)

Committee,[2] it was stated that to separately classify religious orders would indicate that they were not within the meaning of the term "church", contrary to facts and church law. When the Senate Finance Committee issued its report on the bill, deleting the words "or a religious order," it showed that it intended a broad construction, based on structure, when it stated:

> "Your committee understands that 'church' to some denominations includes religious orders *as well as other organizations which, as integral parts of the church are engaged in carrying out the functions of the church whether as separate corporations or otherwise.* It is believed that the term 'church' should be all inclusive. To retain the phrase 'or a religious order' in this section of the bill will tend to limit the term and may lead to confusion in the interpretation of other provisions of the bill relating to a church, a convention or association of churches. Accordingly, your committee believes that this section of the bill will be clarified by this section of the bill." (Emphasis added.)[3]

b) Even earlier, in 1950, when the predecessor section to present Section 511 was being considered, the bill provided an exemption to "churches" from the tax on unrelated business taxable income. During the hearings conducted by the Senate Finance Committee on H.R. 8920, it was pointed out:

> "The exemption of a 'church' does not protect these independent churches [Baptist churches and other churches having a similar structure] in their cooperative religious activities as it does the churches of other faiths integrated into

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[2]See Hearings on H.R. 8300 before the Senate Finance Committee. 83rd Cong., 2nd Sess. 1028 (1954).

[3] See S. Rep. No. 1622, 83rd Cong., 2nd Sess. 30 (1954).

an organic church having over-all ecclesiastical authority, and being itself autonomous."[4]

As a result of this testimony, the Senate amended Section 301(b)(1) of H.R. 8920 so that it used the words "church, convention or association of churches." The House agreed to this amendment in conference, and the amendment was ultimately incorporated into law as Section 421(a)(1)(A) of the Internal Revenue Code of 1939. This language was recodified, without change, as Section 511(a)(2)(A) of the Internal Revenue Code of 1954. The exemption in that Section has since been revoked, except to the extent set forth in Section 512(b)(14).

It is apparent from the foregoing legislative history that the phrase was intended to provide an exemption to churches in whatever form they might be organized, focusing on the structure through which religious activities are carried out, without dissecting that structure according to each of its activities.

c) As late as 1974, Congress enacted Section 410(d) and 414(e)(1)(A) of the Code, using the phrase, "church or convention or association of churches." These provisions deal with certain church plans under the Employees Retirement Income Security Act, which also must be seen as "social legislation." There is no indication in the legislative history that Congress then foresaw dissecting a church body in the way being proposed by the Secretary of Labor. Indeed, the Treasury Department, in its proposed regulations to Section 414(e)(1)(A),[5] apparently

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[4] Hearings before the Senate Finance Committee, 81st Congress, 2d Session, on H.R. 8920, p. 216; language in brackets supplied.

[5] "For the purpose of this section the term "church" includes a religious order or a religious organization if such an order or organization (1) is an integral part of a church, and (2) is engaged in carrying out the functions of a church, *whether as a civil law corporation or otherwise.*" (Emphasis added.) Proposed Reg. 1.414(e)-1(e), CFR 4/8/77.

believes that Congress anticipated that the phrase extends to other organizations, even those separately incorporated, that are related to a church or convention or association of churches and involved in functions of the church.

d) Even Section 6033, which uses the phrase, "churches, integrated auxiliaries and conventions or associations of churches," gives no support for dissecting a body which itself is beyond any doubt a church or a convention or association of churches. These provisions provide exemptions from filing Form 990, an annual report form. Notwithstanding that the Internal Revenue Service, as the regulatory body involved, is inclined to want the exemption construed narrowly, it has never suggested that an organization will be dissected, activity by activity, in determining whether Form 990 is to be filed or not. Indeed the Regulation impliedly concedes that an elementary school which does not have a legal existence separate from the church which operates it is not required to file Form 990 and expressly concedes that another activity, an orphanage, not having a separate legal identity from the church operating it is part of that church for purposes of applying the law.[6]

2. A law regulating or otherwise affecting activities undertaken in the exercise of religion should be required to be precise and unambiguous. When an exemption is afforded, to those engaged in religious activities, from a law regulating or otherwise affecting persons or organizations generally, the exemption

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[6] "School B, an elementary grade school . . . is affiliated . . . with a church . . . . School B *has a separate legal identity from that of the church* . . . . B is not an integrated auxiliary of a church . . . ." (Emphasis added.) See Reg. 1.6033-2(g)(5)(c)(iv), Example 2. "Orphanage F . . . does not have a legal identity separate from that of the Church which operates it.1 . . . The exception from filing a return under Section 6033 accorded to the church of which Orphanage F is a part also applies to Orphanage F itself, "Example 3". Fed. Reg. 1/4/77, pages 777-768.

should also be precise and unambiguous. Furthermore, as this Court held in *NLRB* v. *Catholic Bishop,* 440 U.S. 490 (1979), absent a clear showing that Congress so intended, the law will not be interpreted in a way in which difficult and sensitive First Amendment issues are created. The exemption in Section 3309(b)(1)(A), if given its plain meaning, will not create those issues. It provides an exemption from coverage as to those who perform services in the employ of acertain kind of organization, using words which describe the employing organization according to its structure as a "church or convention or association of churches".

Notwithstanding this precise and unambiguous test which does not risk violation of rights protected by the Constitution, the Secretary has introduced imprecision and ambiguity by an interpretation of Section 3309(b)(1)(A) which is based upon an activities test. The Secretary proposes the exemption be available only as to those employees who are engaged in *strictly* (whatever that means) *church duties* (whatever those are) *performed . . . pursuant to . . . religious responsibilities* (whatever those are).[7]

It certainly cannot be asserted that no elementary or secondary school operated by a church or a convention or association of churches is a religious activity. On the other hand, unless each organization is permitted to conclusively define its own "strictly church duties" and "religious responsibilities," the test itself will necessitate the Department of Labor (or, under its coercion, the state governments), and ultimately the courts, to first inquire into beliefs and practices of each church organization, then to judge whether the schools are part of the exercise of religion of that church organization, and finally to maintain

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[7] Letter from Secretary of Labor Ray Marshall to the Most Reverend Thomas C. Kelly, General Secretary, United States Catholic Conference (Apr. 18, 1978).

continued surveillance of the church organization to determine whether its schools, under its beliefs and practices, continue to be a part of its exercise of religion. All of this would, of course, unduly interfere with free exercise of religion and excessively entangle the government in the church's affairs.

Furthermore, if the government, operating under the Secretary's scheme, actually found that the schools of some church organizations are within the exercise of religion (as many groups have consistently declared, in some cases for centuries), but that the schools of other church organizations were not within the exercise of religion, there would be a clear-cut case of classic "establishment" as forbidden by the First Amendment.

The point which the Synod is here making is that the very establishment of the activities test proposed by the Secretary is itself, as a threshold matter, a violation of the First Amendment religion clauses as to any organization to which the government might even begin to apply the test. Consequently the test must be struck down by this Court.

## CONCLUSION

The Secretary's interpretative scheme is a blatant "end-run" on the First Amendment. It is an end-run in that it really stands for the proposition that operating elementary and secondary education programs in lieu of compulsory public education is not a religious function of a church, and so such activities are not even entitled to the protections afforded by the religion clauses of the First Amendment. If the Secretary's interpretation is allowed to stand, then there is no need to weigh and balance public interests to determine whether interference with free exercise of religion in the church's schools is "undue": the Secretary would simply assert that there is no religion being exercised. If the Secretary's interpretation is allowed to stand, then there is no need to evaluate the quantity of entanglement of

government with the churches which operate the schools to determine whether it is "excessive": the Secretary would assert that there is no religion with which government would be entangled.

The Synod asks this Court to reject the Secretary's interpretation of the exemptions under section 3309(b)(1) of Federal Unemployment Tax Act.

December, 1980

Respectively Submitted,

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